NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 11 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SAMUEL N. BROWN,

Petitioner - Appellant,

v.

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; JAMES E. HALL Warden,

Respondents - Appellees.

No. 07-15289

D.C. No. CV-03-01965-FCD/KJM

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, District Judge, Presiding

Argued and Submitted August 11, 2008
San Francisco, California

Before: THOMPSON and WARDLAW, Circuit Judges, and MOSKOWITZ, District Court Judge.**

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

Samuel N. Brown ("Brown"), a California state prisoner, appeals the denial of his 28 U.S.C. § 2254 habeas corpus petition challenging his conviction by jury trial for attempted murder and mayhem. Brown argues that his Sixth Amendment right to counsel was violated when his attorney failed to investigate his alibi defense and then failed to present it until after the defense rested. Brown also argues that his attorney was ineffective for failing to present evidence proving Brown did not possess a specific physical identifying trait possessed by the shooter–a limp.

In order to make out a claim for ineffective assistance, a petitioner must demonstrate both that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Following the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a petitioner "must show that the [state court] applied *Strickland* to the facts of [the] case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 699 (2002).

Brown has not shown that further investigation of his alibi would have produced anything significant or that a different presentation of the defense would have been more convincing. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different."). Brown also has failed to show that his trial attorney acted unreasonably in determining that it would be difficult to prove that Brown did not have a limp and that it would be potentially damaging to present such evidence. *See Bell*, 535 U.S. at 702 ("[A] court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." (*citing Strickland*, 466 U.S. at 689)). We conclude that the state court did not apply *Strickland* in an "objectively unreasonable manner." *Bell*, 535 U.S.

We decline to broaden the Certificate of Appealability to incorporate the uncertified issues.

AFFIRMED.